**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, *et al.* :

:

v. : C-2014-2427659

:

Respond Power LLC :

**ORDER**

**GRANTING MOTION FOR CONTINUANCE**

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG), and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (collectively referred to as “the Joint Complainants”) filed with the Pennsylvania Public Utility Commission (Commission) a formal Complaint against Respond Power LLC (Respond or “the Company”), at Docket Number C-2014-2427659. The Joint Complainants averred that they had received numerous contacts and complaints from consumers related to variable rates charged by Respond, including approximately twenty formal complaints filed by consumers at the Commission. The Joint Complainants further averred that Respond used a variety of marketing and advertising mediums to solicit residential customers for its variable rate plan. As a result, the Joint Complainants averred nine separate counts against Respond, including, but not limited to, making misleading and deceptive claims, making misleading and deceptive promises of savings, slamming and failing to provide accurate pricing information. The Joint Complainants made several requests for relief, including providing restitution and prohibiting deceptive practices in the future. The Joint Complainants provided several attachments to their Complaint.

On July 10, 2014, Respond filed an Answer and New Matter in response to the Complaint. In its Answer, Respond admitted or denied the various averments made by the Joint Complainants. In particular, Respond specifically denied that multiple violations of Pennsylvania law have occurred and that consumers were misled or deceived as to the price they would pay for electricity. Respond averred that, on the contrary, consumers knowingly entered into agreements with Respond to purchase electric generation service through variable rate plans under which prices would vary month to month on the basis of wholesale market conditions. In its New Matter, Respond averred, among other things, that the Complaint ignores the market conditions that started in January 2014 that precipitated the variable price increases to which many consumers were exposed resulting in a spike in the volume of informal and formal complaints filed by consumers with the Commission.

Also on July 10, 2014, Respond filed Preliminary Objections in response to the Complaint. In its Preliminary Objections, Respond averred that five of the nine counts in the Complaint should be dismissed for lack of Commission jurisdiction, insufficient specificity of a pleading and/or legal insufficiency of a pleading, as discussed further below. On July 21, 2014, the Joint Complainants filed an Answer to Respond’s Preliminary Objections. In their Answer, the Joint Complainants asserted that Respond’s Preliminary Objections are unsupported and should be overruled. On August 20, 2014, an Order Granting in Part and Denying in Part Preliminary Objections was issued striking one Count in its entirety and three counts in part.

On August 25, 2014, an Initial Prehearing Conference was convened where various procedural issues were discussed. Following the Initial Prehearing Conference, Procedural Order #2 was issued establishing 1) that the Joint Complainants would submit written direct testimony of consumer witnesses it intends to present in this proceeding by Friday, October 24, 2014; 2) that evidentiary hearings for purposes of admitting the written direct testimony of the consumer witnesses subject to cross examination and timely objections will be held on November 10 and 12, 2014; and, 3) a Further Prehearing Conference will be held in this matter on November 25, 2014.

On October 22, 2014, Respond filed a Motion for Continuance seeking to have continued the evidentiary hearings scheduled for November 10 and 12, 2014. In its Motion, Respond argued that it needs sufficient time to retrieve and review enrollment documents and call recordings and to prepare for the cross-examination of approximately 200 consumer witnesses recently identified by the Joint Complainants. Respond also argued that ample time is needed for the parties to engage in meaningful settlement discussions and to ensure the efficient handling of logistics associated with the evidentiary hearings, including the scheduling of consumer witnesses and the use of exhibits and call records. Respond stated that the Joint Complainants have indicated that they do not oppose the request for a continuance provided that any additional time is used to engage in meaningful settlement discussions.

On October 24, 2014, pursuant to Procedural Order #2, the Joint Complainants submitted written direct testimony of approximately two hundred (200) consumers, comprising more than 1100 pages of testimony and exhibits.

Also on October 24, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Petition to Consolidate the formal Complaint it filed against Respond on August 21, 2014 with the formal Complaint filed against Respond by the Joint Complainants. The Petition to Consolidate will be granted via a separate Order.

Also on October 24, 2014, an informal, off-the-record conference call was held amongst the parties and the Presiding Officers regarding various procedural matters. During the conference call, a lengthy discussion was held regarding the various issues related to Respond’s Motion for Continuance and I&E’s Motion to Consolidate, as well as other procedural issues. The purposes of this Order are to grant Respond’s Motion for Continuance and to confirm matters agreed to during the informal conference call.

Section 1.15(b) of the Commission’s regulations allows for continuances of hearings for “good cause shown.” 52 Pa. Code § 1.15(b). In this case, Respond stated that the Joint Complainants indicated in their Prehearing Memorandum that they estimated providing written testimony or affidavits from 93 consumer witnesses, and reserved the right to call additional witnesses. As noted above, however, the Joint Complainants, in fact, submitted written testimony for approximately 200 consumer witnesses, comprising approximately 1,100 pages of testimony and exhibits. Respond estimated that it would need 200 hours for two Respond employees to review the necessary documents and that it is highly unlikely that two days currently set for evidentiary hearings would be sufficient for cross-examination of 200 consumer witnesses. Respond added that additional time for the evidentiary hearing would allow for additional settlement discussions and time to effectively address logistical issues associated with the evidentiary hearing, especially in light of the consolidation of the Complaint filed by the Joint Complainants with the Complaint filed against Respond by I&E, as mentioned above.

No party opposed the Motion for Continuance filed by Respond.

The Motion for Continuance will be granted. The evidentiary hearings scheduled for November 10 and 12, 2014 will be cancelled and rescheduled for January 26, 2015 to January 30, 2015. The Further Prehearing Conference scheduled for November 25, 2014 will be cancelled and rescheduled for February 20, 2015.

Respond’s Motion should be granted because good cause has been shown. In particular, the Joint Complainants originally indicated that they would present the testimony of approximately 93 consumer witnesses when in fact the pre-served written testimony of approximately 200 consumer witnesses was presented. As a result, it is reasonable to allow Respond additional time to review the pre-served testimony and allow it to prepare for the hearings. Furthermore, it is reasonable to schedule twice as many days for hearings. To do this, however, the originally scheduled hearings must be continued. Additionally, granting Respond’s Motion will allow the parties additional time to expedite the hearings because, as discussed further below, the parties are being directed to coordinate the most efficient means for admitting the pre-served testimony subject to cross-examination and timely motions. Granting Respond’s Motion will allow the parties more time to do this. Granting Respond’s Motion will also allow for additional time for the Commission to act on Petitions for Interlocutory Review that remain outstanding. Commission action on those Petitions may also help expedite the hearings that are being continued. Finally, the parties have also indicated that continuing the hearings will allow additional time for the parties to engage in meaningful settlement discussions.

The parties are directed to coordinate the most efficient means for admitting the pre-served consumer testimony into the record, subject to cross-examination and any timely motions. This includes entering into any Stipulations or waiving the need to cross-examine any witnesses. To help expedite the evidentiary hearings, Respond will indicate to the Presiding Officers and the parties no later than December 22, 2014 which customers it intends to cross-examine. All other consumer witness testimony pre-served on October 24, 2014 will be admitted without cross-examination. Additionally, Respond will circulate to the Presiding Officers and the parties no later than January 12, 2015 the exhibits it intends to use during the evidentiary hearings. Any Motions to Strike testimony will be filed no later than January 19, 2015. The parties are directed to indicate which witnesses, if any, they intend to present in-person, with all other witnesses being presented telephonically. The parties are encouraged to engage in any other activity that will help expedite the evidentiary hearings scheduled for January 26 to 30, 2015. The parties are advised that it is unlikely that a further continuance of these evidentiary hearings will be granted, absent exigent circumstances.

The parties are also reminded that Commission policy promotes settlements. 52 Pa.Code § 5.231(a). The parties are encouraged to continue settlement discussions as early as possible. Even if the parties are unable to settle this case, they may still resolve some of the questions or issues during their discussions. If the parties reach an agreement on all issues, a formal hearing will not be necessary and the scheduled hearing will be cancelled. Any settlement, however, must be supported by substantial record evidence. 2 Pa.C.S. § 704. The parties are directed to advise the Presiding Officers of all future settlement activity.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion for Continuance filed by Respond Power LLC on October 22, 2014 in the above-captioned proceeding is hereby granted.
2. That the evidentiary hearings scheduled for November 10 and 12, 2014 are cancelled and rescheduled for January 26, 2015 to January 30, 2015.
3. That the Further Prehearing Conference scheduled for November 25, 2014 is cancelled and rescheduled for February 20, 2015.
4. That the parties are directed to coordinate the most efficient means for admitting the pre-served consumer testimony into the record, subject to cross-examination and timely objections, including entering into any Stipulations or waiving the need for cross examination.
5. That Respond Power LLC will indicate to the Presiding Officers and other parties no later than December 22, 2014 which customers it intends to cross-examine.
6. That Respond Power LLC will circulate to the Presiding Officers and the other parties no later than January 12, 2015 the exhibits it intends to use during the evidentiary hearings.
7. That Respond Power LLC will file no later than January 19, 2015 any Motions to Strike pre-served consumer testimony.
8. That the parties are advised that it is unlikely that a further continuance of these evidentiary hearings will be granted, absent exigent circumstances.
9. That the parties are encouraged to continue settlement discussions and are directed to advise the Presiding Officers of all future settlement activity.

Date: October 28, 2014

Elizabeth Barnes

Administrative Law Judge

Joel H. Cheskis

Administrative Law Judge

**C-2014-2427659 - ATTORNEY GENERAL PA & OFFICE OF CONSUMER ADVOCATE v. RESPOND POWER LLC**

***REVISED 8/26/14***

JOHN M ABEL ESQUIRENICOLE R BECK ESQUIRE

PA OFFICE OF ATTORNEY GENERALBUREAU OF CONSUMER PROTECTION15TH FL STRAWBERRY SQUAREHARRISBURG PA 17120CANDIS A TUNILO ESQUIRECHRISTY APPLEBY ESQUIREKRISTINE E ROBINSON ESQUIRE

OFFICE OF CONSUMER ADVOCATE5TH FLOOR FORUM PLACE555 WALNUT STREETHARRISBURG PA 17101-1923SHARON WEBB ESQUIREOFFICE OF SMALL BUSINESS ADVOCATESUITE 1102300 NORTH SECOND STREETHARRISBURG PA 17101717-783-2525

ADAM YOUNG ESQUIRE

MICHAEL L SWINDLER ESQUIRE

WAYNE T SCOTT ESQUIRE

PA PUC I&E

PO BOX 3265

HARRISBURG PA 17105-3265

***Accepts eService***

KAREN MOURY ESQUIRE

BUCHANAN INGERSOLL ROONEY PC409 NORTH SECOND STREETSUITE 500HARRISBURG PA 17101

***Accepts eService***